SUBJECT INDEX.

PAGE

I.

The case at bar is not within any of the provisions of Rule 38 of the Supreme Court of the United States 3

A. Specifications 1 and 2 are untenable for the reason that the Circuit Court of Appeals did not disregard any finding of the trial court, nor did it depart from precedent in any respect 6

B. Specifications 3 and 4 alleging that the Circuit Court of Appeals held the findings of the trial court to be inconsistent and that a new trial was therefore required is untenable because in fact the Circuit Court of Appeals found and held that each of the findings jointly and severally support the judgment of the trial court 13

C. The fifth specification alleging that the opinion places upon the contract a novel and strange construction contrary to its language is untenable since the opinion not only follows established specific precedent, but also conforms with the universal rules of construction applicable to insurance contracts 13

Conclusion 23

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Barnsdall v. Waltemer, 142 Fed. 415	8
Caldwell v. Blodgett, 256 Fed. 744	10
First National Bank of Ardmore v. Litteer, 10 Fed. (2d) 447	10
Flour City Ornamental Iron Works v. Schuler, 260 Fed. 662	10
German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097	19
Hirning v. Live Stock National Bank, 1 Fed. (2d) 307	9
Hustace v. Phenix Ins. Co. of Brooklyn, 175 N. Y. 292, 67 N. E. 592	20
Laing v. Rigney, 160 U. S. 531	8
Lamb v. Belt Casualty Co., 3 Cal. App. (2d) 624	19
Liverpool and London and Globe Ins. Co. v. Kearney, 180 U. S. 132, 45 L. Ed. 460	15
O'Connell v. N. J. Fed. Ins. etc. Co., 201 App. Div. 117, 138 N. E. 744	5, 7, 13, 14
Pacific etc. Co. v. Williamsburg etc. Insurance Co., 158 Cal. 367	17, 18
Societe Nouvelle d'armement v. Barnaby, 246 Fed. 68	8
Thames and Mersey Marine Ins. Co. v. Pacific Creosoting Co., 223 Fed. 561	16
Ward v. Joslin, 186 U. S. 142	8, 9
Wear v. Imperial Window Glass Co., 224 Fed. 60, 139 C. C. A. 622	9
Williams v. Nelson, 228 Mass. 191, 117 N. E. 189	5, 7, 13, 15
Wilson v. Travelers Ins. Co., 183 Cal. 65	18

STATUTES.

28 United States Codes, Annotated, Sec. 875 ..... 4, 7

TEXT BOOKS AND ENCYCLOPEDIAS.

32 Corpus Juris, Sec. 259, p. 1150 16

32 Corpus Juris, Sec. 266, p. 1155 16

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term 1937
No. 519.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Petitioner,

vs.

JAMES D. COUGHRAN,

Respondent.

Argument and Authorities in Opposition to Petition for Writ of Certiorari.

This brief is respectfully submitted in reply to the contentions of the petitioner.

I.

THE CASE AT BAR IS NOT WITHIN ANY OF THE PROVISIONS OF RULE 38 OF THE SUPREME COURT OF THE UNITED STATES.

It is contended by petitioner that the Supreme Court of the United States should intervene in this action upon the grounds that the Circuit Court of Appeals has departed from precedent, has ignored findings of fact of the trial

court, and has misapplied the law to the insurance contract in question. Respondent most earnestly submits that these contentions are untenable, and spring from a distorted construction of the opinion and a misapprehension as to what the Circuit Court of Appeals plainly did.

The Circuit Court of Appeals did not disregard the findings of the trial court, but on the contrary expressly stated that it was bound thereby [R. p. 95]:

> "This court is bound by the facts found by the trial judge, 28 U. S. C. A., Sec. 875."

The Court then proceeded to find and to declare that the special findings support the judgment. U. S. C. A., Sec. 875, expressly empowers the Circuit Court of Appeals to determine whether or not special findings of fact support a judgment appealed from. The Court decided that either and both of the challenged findings support the judgment. The concluding sentence of the majority opinion is as follows (italics added):

> "The finding elucidated by the evidence does sustain the finding III as the ultimate fact as to operator of the car herein indicated, (and finding XII alone shows operation of the car by Helen B. Anthony), and the general conclusion of law is sustained by the finding *and all sustain the judgment.*" [R. p. 102.]

It is true that the Circuit Court of Appeals found that the *evidence* did not support finding XII (the finding relied on by petitioner), but it concluded that finding XII alone (standing alone) also supported the judgment in

finding that Helen B. Anthony operated the car. (It is clear that the term "alone" in the parenthetical comment above is used in the sense of "standing alone" since finding III declares that Helen B. Anthony operated the car and therefore it was not meant that only finding XII found that fact.)

Petitioner, which now denies the power of the Court to inspect the evidence, expressly requested that the Court do so, notwithstanding the fact that petitioner had not preserved in the record any right to such review. Petitioner's first, second and third specifications of error [R. pp. 71-73] all invited the inspection of the evidence by the Circuit Court of Appeals by asserting that the *evidence* (not merely the finding) required a judgment in petitioner's behalf. Specification XIII [R. p. 78] declares that the *evidence* does not support the findings of fact and thereby solicits a review of the evidence by the Circuit Court of Appeals, notwithstanding the deficiency of petitioner's record. Certainly petitioner, having invited such reference to the evidence, is estopped from claiming error, particularly after the evidence has been found to support all material findings and the judgment.

Finding III and finding XII, taken together and each standing alone, support the judgment imposing liability upon petitioner as insurer, under all of the known law upon the identical subject. (*O'Connell v. N. J. Fed. Ins. etc. Co.*, 201 App. Div. 117, 138 N. E. 744, *Williams v. Nelson*, 228 Mass. 191, 117 N. E. 189.) The cited cases, discussed in the third section of this brief, and decided by

the highest court of Massachusetts and New York, involve identical policies of insurance and identical facts as to the operation of the insured cars, and each holds the insurer liable. No contrary decision is known to counsel for either party. Petitioner's contention that the decision of the Circuit Court of Appeals places a novel and unusual construction upon the policy is in direct contradiction of the true situation.

For the sake of convenience petitioner's contentions, grouped as five specifications of error (Petition p. 14), are considered in chronological order.

A. Specifications 1 and 2 Are Untenable for the Reason That the Circuit Court of Appeals Did Not Disregard Any Finding of the Trial Court, Nor Did It Depart From Precedent in Any Respect.

It is contended by petitioner that the Circuit Court of Appeals disregarded the special findings of the trial court. This conclusion may be reached only by distorting the opinion, by isolating a certain portion thereof and by ignoring the ultimate conclusion of the Court, supported by authority, that *all* of the findings supported the judgment. This was all to which petitioner was entitled, and the inspection of the evidence by the Court, which petitioner had requested in its specifications of errors, could in no way have resulted in prejudice. As quoted above, the Circuit Court of Appeals expressly stated that it was bound by the findings of the trial court, and it then held that all of the findings support the judgment.

It must be conceded by petitioner that the Circuit Court of Appeals was empowered to determine whether or not the findings support the judgment. U. S. C. A., Sec. 875, concludes as follows:

> ". . . and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Each and all of the findings concerning the operation of the car, taken jointly or severally, support the judgment under the authorities cited and discussed hereinafter.

Finding III, standing alone, supports it.

Finding XII, standing alone, supports it. (*O'Connell v. N. J. Fed. Ins. etc. Co.,* 201 App Div. 117, 138 N. E. 744; *Williams v. Nelson,* 228 Mass. 191, 117 N. E. 189.)

Finding XVII [R. p. 25] supports it. (Authorities, ***supra.***)

All of the findings, taken together, as found by the Circuit Court of Appeals, also support the judgment, including finding XII, which petitioner contends entitles it to judgment. To reiterate, the concluding sentence of the majority opinion is (italics added):

> "The finding elucidated by the evidence does sustain the finding III as the ultimate fact as to operator of the car herein indicated, (and finding XII alone shows operation of the car by Helen B. Anthony) and the general conclusion of law is sustained by the finding *and all sustain the judgment.*" [R. p. 102.]

The Circuit Court of Appeals, in arriving at this conclusion, is not only supported by general and fundamental rules of construction applicable to insurance policies, but by specific adjudications of the rights of the parties in

identical and indistinguishable situations, by the highest courts of Massachusetts and New York. There is no authority to the contrary.

The gist of petitioner's complaint and the phase of the opinion which arouses petitioner's apparent apprehension as to the effect of the opinion upon precedent, is the fact that the Circuit Court of Appeals made reference to the evidence for the purpose of deciding whether there existed any evidentiary support of the findings. It is asserted by the petitioner that the Circuit Court of Appeals is not empowered to do this. This assertion is made in the face of the fact that petitioner itself assigned in its specification of errors, as grounds for reversal, the insufficiency of the *evidence* to support the judgment. In this regard petitioner has not correctly stated the rule. The true rule is that where appellant's record has been properly preserved, the Circuit Court of Appeals may always ascertain whether or not there is *any* evidentiary support for the findings of the trial court.

Barnsdall v. Waltemer, 142 Fed. 415, 417;

Ward v. Joslin, 186 U. S. 142;

Laing v. Rigney, 160 U. S. 531, 540;

Societe Nouvelle d'armement v. Barnaby, 246 Fed. 68.

In *Laing v. Rigney,* 160 U. S. 531, at page 540, the Supreme Court of the United States stated:

> "The plaintiff duly excepted to the findings and conclusions, and it is well settled that exceptions to alleged findings of fact because unsupported by evidence present questions of law reviewable in courts of error."

In *Ward v. Joslin,* 186 U. S. 142, at page 147, the Supreme Court of the United States said:

> "When a case is tried by the court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based."

The true rule, therefore, is that where an exception has been taken to a finding, or where by some other process the attention of the trial court has been directed to the insufficiency of the evidence to support the same, the question of the *existence* of evidence becomes one of law, and the reviewing court may consider it. In the case at bar petitioner sought a review of the evidence by the Circuit Court of Appeals. It did not confine itself to an attack upon the findings, but asserted the insufficiency of the evidence to support the findings. It is and was the contention of petitioner that the evidence entitles it, as a matter of law, to judgment, and that a judgment for respondent is without evidentiary support. There is no authority sustaining this contention, the authorities being instead definitely to the contrary. But were it as contended by petitioner, it would have been necessary for the petitioner to have made a motion for judgment, or in some other manner to have presented the question of the legal sufficiency of the evidence to the trial court for a ruling, otherwise petitioner is precluded in the appellate court.

The following quotation is from *Wear v. Imperial Window Glass Co.,* 224 Fed. 60, at page 63, 139 C. C. A. 622, at page 625, and is quoted verbatim and followed in *Hirning v. Live Stock National Bank,* 1 Fed. (2d) 307, at page 310:

> "When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the act of Congress forbids a reversal by the Appellate Court of that finding, or the judgment therein, 'for any error of fact,' and a finding of fact contrary to the weight of the evidence is an error of fact. The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling therein during the trial."

In the case of *First National Bank of Ardmore v. Litteer,* 10 Fed. (2d) 447, appellant challenged the sufficiency of the evidence to support the special findings of the trial court. The Court stated (p. 448):

> "At the trial below counsel for plaintiff did not except to any of the findings, did not request any additional finding, and did not by motion or other like action challenge the sufficiency of the evidence to support the finding. . . .
>
> "The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion, made, denied, and excepted to, or some other like action is taken wihch fairly presents that question to the trial court and secures its ruling thereon during the trial."

To the same effect is *Flour City Ornamental Iron Works v. Schuler,* 260 Fed. 662, and *Caldwell v. Blodgett,* 256 Fed. 744, at page 745.

In the case at bar no motion for judgment was made by petitioner, no motion for any specific finding was made by it, no findings whatever were requested by it, no request for a declaration of the law was made and no exception was taken to any of the findings of the trial court. In brief, the question of the legal effect of the uncontradicted evidence in the case at bar was never raised in the trial court. This alone precludes petitioner from a further review of the case.

Notwithstanding the fact that the petitioner presented no record to the Circuit Court of Appeals entitling it to any review of the evidence, petitioner requested that the Court review the evidence. Had the Circuit Court of Appeals gone behind the findings of fact and determined that some material finding was not supported by the evidence thereby reversing the judgment, petitioner, and not this respondent, would have gained thereby. This discussion is of purely academic interest for the reason that the decision of the Circuit Court of Appeals was that the findings support the judgment, that every material finding was supported by the evidence, and that even finding XII, relied on by petitioner, supports the finding of the ultimate fact as to the operator of the car. Reply is made thereto because of the vigor with which petitioner, proceeding upon a mistaken premise as to what the Court did, attacks its decision.

Had the petitioner preserved its record it would have been entitled to a review of the evidence for the purpose of determining whether or not there was any evidence to

support the findings of the trial court (authorities *supra*). Petitioner received such a review, notwithstanding the fact that it was not entitled thereto. May a litigant in such a position assign as error the action of an appellate court in looking behind adequate findings and determining that the evidence, as well as the findings, supports the judgment of the trial court? The present contentions arise from a failure on petitioner's part to realize that a review of the evidence in this case, *the findings being such as to support the judgment,* could aid only it and in no way the respondent, for the findings, standing alone, entitled respondent to an affirmation of the judgment. Paradoxically, a legal shield of the respondent is sought to be wielded by petitioner as a sword.

The opinion of the Circuit Court of Appeals may be read from beginning to end and nowhere is there any evidence that a finding of the trial court was ignored. The Court found an inconsistency, and that the finding relied on by petitioner was unsupported by the evidence, but it correctly concluded that under *either or both* of these findings respondent was entitled to judgment. The Court performed its statutory duty of determining whether the findings support the judgment and decided that they did. Authorities sustaining this conclusion are discussed in the third section of this brief. The fact that the Court went further, with or without the request of petitioner, and ascertained that the evidence also supported the judgment could not have prejudiced petitioner.

B. Specifications 3 and 4 Alleging That the Circuit Court of Appeals Held the Findings of the Trial Court to Be Inconsistent and That a New Trial Was Therefore Required Is Untenable Because in Fact the Circuit Court of Appeals Found and Held That Each of the Findings Jointly and Severally Support the Judgment of the Trial Court.

Assuming inconsistency in the findings, it is clear that no prejudice resulted to petitioner when each and all of the findings establish petitioner's liability. Under general principles of insurance law and under previously adjudicated cases on indistinguishable facts, petitioner's liability is established by any and all of the trial court's findings. When the Circuit Court of Appeals decided that the findings supported the judgment, this was all to which petitioner was entitled.

C. The Fifth Specification Alleging That the Opinion Places Upon the Contract a Novel and Strange Construction Contrary to Its Language Is Untenable Since the Opinion Not Only Follows Established Specific Precedent, But Also Conforms With the Universal Rules of Construction Applicable to Insurance Contracts.

The attention of the Court is respectfully called to the following decisions:

O'Connell v. N. J. Fed. Ins. etc. Co., 201 App. Div. 117, 139 N. E. 744;

Williams v. Nelson, 228 Mass. 191, 117 N. E. 189.

In each of the above cases, policies of insurance issued by the defendant contained the same exclusion clauses as to minors as did the policy in the case at bar. In each

of them at the time of the accident, a minor excluded by the policy, occupied the driver's seat with an adult person to his right. In each of them, the adult person seized the wheel as in the case at bar and was steering the car at the time of the accident. In each of them, it was held that the insurer was liable notwithstanding the exclusion clause of the policy. The trial court was justified in finding as a fact that Helen B. Anthony was driving the car at the time of the accident. The evidence in the case at bar was indistinguishable from the evidence in the cases cited in which such findings were approved.

In the case of *O'Connell v. N. J. Fed. Ins. etc. Co., supra,* the policy provided as follows (p. 117; italics added):

> "This policy does not cover loss on account of injury or death suffered by any person or persons caused by an automobile (a) *while* driven by or in charge of any person in violation of law as to age, *or in any event under the age of 16 years.*"

The facts as taken from the abstract of that case were as follows (italics added):

> "The assured's automobile was being driven by his granddaughter, a 14 year old girl. In crossing a bridge where repair work was going on, she attempted to turn out around the repair work, and in so doing headed the automobile for the bridge railing. The assured, *who was sitting next to her, acted in this sudden emergency, seized the wheel and turned the car sharply* to avert plunging over the side of the bridge, and in so doing swung the car against the deceased, who was working on the bridge, throwing him therefrom."

It will be seen that the facts of the accident were identical to those in the case at bar, in which Helen B. Anthony seized the steering wheel and turned the car sharply against the truck which was engaged in passing the respondent, causing it to collide with him. The exclusion of the policy was also identical. The insurer was held liable under the policy to the heir of the deceased.

In the case of *Williams v. Nelson, supra,* the exclusion of the policy was likewise identical and the facts of the accident the same. The insurer was held liable notwithstanding the exclusion clause.

None of the cases cited by appellant involve facts in any way similar to the case at bar.

Entirely aside from these specific adjudications, general principles of construction applicable to insurance policies establish petitioner's liability. It was conceded by petitioner, as pointed out in the opinion of the Circuit Court of Appeals, that "the question presented was a simple question of interpretation of a contract." It is a platitude of insurance law that policies of insurance, in cases of uncertainty, due to clauses which conflict under the circumstances of the casualty, or for any other reason, are to be construed against the insurer, and in favor of protection rather than against it. The uncertainty invoking this rule of construction may arise from the nature of the casualty as well as from the language of the policy. It is stated by the Supreme Court of the United States in the case of *Liverpool and London and Globe Ins. Co. v. Kearney,* 180 U. S. 132, 45 L. Ed. 460, at page 136 of the U. S. report:

> "To the general rule, there is an apparent exception in the case of contracts of insurance, namely, that where a policy of insurance is so framed as to

> leave room for two constructions, the words used should be interpreted most strongly against the insurer."

Authorities to this effect are absolutely legion and an extensive citation thereof would be a mere task of supererogation. In volume 32, *Corpus Juris,* page 1150, section 259, in the text supported by footnotes 66 and 67, which footnotes contain scores of supporting decisions, it is stated:

> "Insurance or indemnity against loss, being the object and purpose of the contract, the courts will construe it, when possible, so as to effectuate this purpose and so as to uphold rather than defeat or avoid, the contract."

It is likewise an axiom of insurance law that exclusion clauses, such as is relied upon by petitioner herein, are to be construed most strongly against the insurer. As stated in volume 32, *Corpus Juris,* commencing at page 1155, section 266, and ending at page 1157, in the text supported by footnote 14:

> "The rule requiring a strict construction against the company and a liberal construction in favor of insurance applies . . . (to) conditions or other provisions employed for the purpose of creating exceptions to, or limitations upon, the liability of the company;"

In *Thames and Mersey Marine Ins. Co. v. Pacific Creosoting Co.,* 223 Fed. 561, a decision of the Ninth Circuit Court of Appeals, it is stated at page 567:

> "It is a fundamental rule in the law of insurance that a stipulation in a policy which is in the nature of an exception to the liability of the insurer, must be

> construed strictly against it, and that words of exception in the policy, if doubtful, are to be construed most strongly against the party for whose benefit they were intended."

The Supreme Court of California, in the case of *Pacific etc. Co. v. Williamsburg etc. Insurance Co.*, 158 Cal. 367, a case in which the uncertainty arose from the nature of the casualty, stated at pages 369-370:

> "But while this is true, it is also a rule well established by the courts, that provisos and exceptions contained in a policy of insurance must be strictly construed against the insurer and liberally in favor of the assured."

The nature of the contingency which arose here is such, under petitioner's contention, as to bring these elementary rules of construction into operation and it was expressly contended to be so in petitioner's opening brief as hereinabove quoted in the opinion of the Circuit Court of Appeals. In the light of this contention, it is found that appellant undertook to insure R. O. Anthony: "Part II. Against legal liability imposed upon the assured resulting solely and directly from an accident by reason of the ownership, maintenance or use of the automobile . . ." and (Part II, clause E, 1 (D)), while "the said automobile is being operated by the assured, his paid driver, members of his immediate family, or persons acting under the direction of the assured." liability was imposed upon R. O. Anthony solely by reason of his "ownership . . . of the automobile", (there being no allegation of agency) by a member of "his immediate family". This is the insuring clause. The exclusion clause provides (Part II, Clause E, 1 (E)) that there is no coverage if the automo-

bile is "being driven or operated by any person . . . violating any law or ordinance as to age or driving license". Under appellant's contention, the car was being driven and operated by two people, one of whom is covered and the other of whom is not.

It is a very common occurrence for an insured risk and an excluded risk to concur in some measure in producing a loss. It is uniformly held in such circumstances that if the insured risk is the proximate cause of the loss, the insurer is liable. The proximate cause of the loss in question was the insured risk, *i. e.,* the act of Helen B. Anthony. [Finding XVII, R. p. 25; Finding XII, R. bottom pp. 22-23.]

Illustrative of the rule are the following California decisions:

In *Wilson v. Travelers Ins. Co.,* 183 Cal. 65, the defendant insurer had issued a policy of accident insurance protecting the assured against injuries sustained through the "wreckage of a passenger car". It expressly excluded liability for injuries caused by an explosion. The assured was injured through the wrecking of a passenger car caused by an explosion and the insurer was held liable under the general insuring clause, the actual proximate cause of the injury being the wrecking of the car.

In *Pacific etc. Co. v. Williamsburg etc. Ins. Co.,* 158 Cal. 367, the policy of insurance protected the assured against losses caused by fire, but expressly excluded liability for losses caused "by or through" earthquake. An

earthquake started a fire which destroyed the assured's property. It was held that the true and proximate cause of the loss was the fire and the insurer was held liable under the general insuring clause, the exclusion not vitiating it.

In *Lamb v. Belt Casualty Co.*, 3 Cal. App. (2d) 624, the insurer covered a truck but expressly excluded liability for damage caused by a trailer. Both a truck and trailer caused the loss and the insurer was held liable. The exclusion clause as to the trailer did not vitiate the insuring clause covering the truck. In that case, unlike the one at bar, the excluded risk was also a proximate cause of the accident, and as the facts show, actually the proximate cause.

In the case of *German Fire Ins. Co. v. Roost,* 55 Ohio St. 581, 45 N. E. 1097, the policy covered damage caused by lightning, but excluded damage caused by explosion. Lightning struck some stored explosives across the street from the insured premises, causing an explosion which destroyed the same. It was contended by the insured that this was a loss caused by lightning and therefore covered by the policy. It was contended by the insurer that the proximate cause of the loss was the explosion. It was held that the insurer was not liable, the lightning being a remote cause. The Court there stated as follows:

> "Respecting the first proposition, it may be said that undoubtedly the rule is that the proximate and not the remote cause of the loss is to be regarded in determining the liability . . . and it is contended

> here, with much effect, that the true rule is that where a new cause has intervened between the fact accomplished and the alleged cause, such new cause must be considered the real cause; . . . that the force and energy which produced the mischief came not from the lightning but from the explosion, and therefore the explosion was a new cause, which intervened, and hence must be regarded as the proximate cause."

The above decision and language quoted therefrom are peculiarly applicable to the case at bar. The proximate cause of the loss here involved has been found by the Court to have been an insured risk, *i. e.,* the act of Helen B. Anthony. Her act was a new cause which intervened between the conduct of Nancy Leidenecker and the injury to this respondent. Although in the cited case the intervening cause was the excepted risk, the rule is obviously the same. In the case at bar, the intervening and proximate cause was the insured risk.

In the case of *Hustace v. Phenix Ins. Co. of Brooklyn,* 175 N. Y. 292, 67 N. E. 592, the policy of insurance covered loss by fire, but expressly excluded loss by explosion. A fire elsewhere caused an explosion which damaged the insured property. It was held that the proximate cause of the loss was the explosion and not the fire, and the insurer was exempted from liability. In the case at bar, the intervening and proximate cause was the insured risk.

If an insured risk and an excluded risk concur in producing a loss, the insured risk being the proximate cause thereof, the insuring clause governs and the insurer is liable.

In the instant case, the proximate cause of the accident was the driving of Helen B. Anthony as found by the trial court. The analogy is obvious and Nancy Leidenecker is relegated to a more remote position in the chain of causation than the earthquake, explosion and lightning in the cases cited. The true causes there were those which proximately caused the losses. The true cause here was the act of Helen B. Anthony as shown by the undisputed evidence and as found by the trial court.

Petitioner seeks to interpret the exclusion clause as the entire contract, and to accept as the sole cause of the casualty the presence of Nancy Leidenecker in the automobile, notwithstanding the fact that the trial court has found from undisputed evidence that Nancy Leidenecker's conduct was not the cause of the accident, but that the accident was proximately caused by Helen B. Anthony. Appellant seeks to see only the exclusion clause in the policy, and only Nancy Leidenecker in the automobile. Hypothetically, under appellant's contention, we have presented a case in which an insurer covers A, excludes B; both A and B are driving and operating the car under this contention, a contingency not provided for in the policy; A's act is the proximate cause of the loss, and the insurer seeks to ignore its coverage of A and to rely entirely upon its exclusion of B. It was the insured risk

which proximately caused the loss. It would require a unique rule of construction to exempt the insurer from liability because of an exclusion clause concerning B, who did not cause the accident, in the presence of an insuring clause concerning A, who did cause the accident. The insuring clause and the rights accruing to the insured and respondent thereunder commands at least the same force and effect as the exclusion clause. In fact, under the uniform decisions of the courts, it plainly commands more force. And the scales are definitely, although unnecessarily, tipped in favor of the respondent by the fact that the driver who caused the accident is described in the insuring clause.

It is not necessary for the application of the rule of construction governing insurance policies that the uncertainty should arise from the language of the policy. The uncertainty may arise from the nature of the casualty as is demonstrated by all of the decisions hereinabove cited, in each of which the language of the policy was clear but the contingencies which arose were such that they belonged partly in the insuring clause and partly in the exclusion clause.

No case conflicting with these principles has been cited by petitioner and counsel for respondent is unaware of any such decision. There is no legal basis for the contention that the opinion of the Circuit Court of Appeals places upon the policy in question a new or novel construction. On the contrary, the opinion of the Court conforms with specific precedent and general precedent.

CONCLUSION.

It is respectfully submitted that the case at bar presents no problem coming within Rule 38 of the Supreme Court of the United States. The Circuit Court of Appeals decided that all the findings of the trial court support the judgment. The review of the evidence which brought the same results was without prejudice to petitioner. No decision in conflict with the one at bar has been cited. Respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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